

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 373 OF 2013

1). Smt. Dwarkabai Bhausahab Rajwanshi

And Ors.

.....Appellants

: V/S :

1). Smt. Indubai Punjaram Rajwanshi and

Ors.

.....Respondents

* * * * *

Mr. S.G. Rajput, Advocate for the appellants.

Mr. RAmeshwar Gite, Advocate for respondents no.1 to 11.

Coram :- Smt. R.P. SondurBaldota, J.**13th January, 2015.****P.C. :-**

1). This Second Appeal is directed against the concurrent findings of the courts below in Regular Civil Suit No. 94 of 1986 filed by one, Bhika the predecessors of respondents no.1 to 6 and respondents no.7 to 11 against one, Nathu, predecessor of the appellants and appellants no.1 and 2 for specific performance of agreement of re-conveyance of the suit property. The parties will hereinafter referred to by their original nomenclature.

2). The factual matrix of the case stated in brief is as follows :-

The suit property i.e. agricultural land at Gat no.204 (4-H 0.03-

R+3.64 Pot-Kharaba) admeasuring 7-H 67-R situate at Mauje Khadki, Taluka-Malegaon, District-Nashik was owned by plaintiff no.1 and his brother, Khandu. Plaintiffs no.2 to 6 are the heirs of Khandu. By the registered sale-deed dated 6th December, 1971 plaintiff no.1 and Khandu sold the suit property to one, Bhausahab Nathu Rajwanshi, the son of defendant no.1 and the grandson of Ramchandra Shivram Rajwanshi. At the relevant time, Bhausahab was a minor. Therefore, Ramchandra had purchased the suit property on behalf of the minor acting as his guardian. The entire transaction had taken place in the presence of defendant no.1. The total consideration mentioned in the sale-deed was of Rs.8,000/-.

3). It is the allegation of the plaintiffs that, Ramchandra used to carry on business of money-lending. Since he did not have a license for the business, the same was carried out in a surreptitious manner. Prior to the year 1971, plaintiff no.1 and Khandu had borrowed a sum of Rs.400/- from Ramchandra. Later in the year 1971, there was a famine and financial condition of the plaintiffs was bad. During that period, mother of plaintiff no.1 and Khandu died. Both were in need of money for performing last rites of their mother. Therefore, they had approached Ramchandra and obtained loan of Rs.4,000/-. The interest on the amount of Rs.400/- borrowed earlier was calculated by Ramchandra at Rs.4,000/-. Thus, the total consideration mentioned in the sale-deed was of Rs.8,000/-. It was the case of the plaintiffs that, on the same date as the sale of the suit

property, agreement of reconveyance of the suit property on payment of Rs.8,000/- was signed. Defendant no.1 had signed the agreement as a witness.

4). Khandu died on 14th January, 1986. The minor, Bhausahab and his grandfather Ramchandra were also no more by then. In the year 1986, the plaintiffs were ready to pay Rs.8,000/- to defendant no.1 and for exercise of their right of reconveyance of the suit property. However, defendant no.1 was not willing to perform the agreement of reconveyance. The plaintiffs therefore served notice dated 29th January, 1986 upon defendant no.1 calling upon him to reconvey the suit property after accepting the amount of Rs.8,000/- from them. When defendant no.1 failed to comply with the request, the suit herein came to be filed.

5). The defendants in their written statement admitted the transaction of sale to Bhausahab, son of defendant no.1 and the presence of defendant no.1 at the time of transaction of sale. However, they denied that the agreement to reconvey the property on payment of Rs.8,000/- was arrived at between the parties or that defendant no.1 had signed the same as a witness. Defendant no.1 alleged that agreement of reconveyance produced by the plaintiff alongwith the plaint is a false and bogus document and put the plaintiffs to proof of its contents. It was also contended that the transaction of sale of the suit property had infact taken place in the year 1967 and that since that year, Bhausahab had become its

owner. However, the sale-deed had remained to be executed and the same came to be executed in the year 1972. Since, Bhausahab was the owner of the suit property, Ramchandra had no right to deal with the same. Besides, as defendant no.1 was alive at the time of transaction of sale, Ramchandra could not have acted as his guardian. The name of Ramchandra came to be included in the agreement of sale and the sale-deed, only because he was the eldest family member. The defendants also alleged that the agreement of reconveyance being an insufficiently stamped and unregistered document, is not admissible in evidence.

6). On the pleadings between the parties, the trial Court framed as many as 16 issues in the suit. The plaintiffs examined plaintiff no.1, plaintiff no.4 and Stamp Vendor, Arvind Chindade in support of their case. The defendants examined only one witness i.e. defendant no.1, in support of their case. The trial Court, on appreciation of the evidence held that, the plaintiffs had established that Ramchandra had obtained the sale-deed dated 6th December, 1971 by way of security towards loan amounts advanced to plaintiff no.1 and Khandu. On the same day, Ramchandra had agreed to reconvey the suit property to plaintiff no.1 and Khandu, whenever they paid Rs.8,000/-. At the time of the transaction of reconveyance, defendant no.1 was present and had witnessed the agreement. In January, 1986 plaintiffs had asked the defendants to accept the amount of Rs.8,000/- and executed the reconveyance deed. The trial

Court also held that, the defendants had failed to establish that the actual sale transaction of the suit property had taken place in the year 1967 and therefore the agreement of reconveyance by Ramchandra on 6th December, 1971 was invalid. It was invalid also because permission of the District Judge for dealing with property of the minor was not taken. The trial Court, further held that, the suit as filed was within the prescribed period of limitation and that the plaintiffs were ready and willing to pay Rs.8,000/- to the defendants as part of their agreement of reconveyance. With these material findings, the trial Court decreed the suit and directed the defendants to execute the sale-deed within a period of one month from deposit of Rs.8,000/- by the plaintiffs in the Court. In the event of failure on the part of the defendants in executing the sale-deed, the plaintiffs are given liberty to have the sale-deed executed through Court. The defendants were also directed to deliver possession of the suit property to the plaintiffs.

6). Being aggrieved by the judgment and decree of the trial Court, the defendants approached the District Court by filing Regular Civil Appeal No.12 of 2000. The District Court, by the order dated 15th March, 2013 confirmed the findings of the trial Court and dismissed the suit. The grounds of challenge to the decree of the trial Court taken up by the appellant before the District Court, as also the grounds taken in the present appeal are essentially on appreciation of the evidence by the Courts

below. The appellants, however, 3rd December, 2014 filed additional grounds urging to be the grounds containing substantial questions of law to challenge the impugned orders. The new grounds relate to admissibility of the agreement of reconveyance. The appellants contended that the agreement was inadmissible in evidence for want of registration as required under Section 17 of the Registration Act. Also, the instrument not being duly stamped was inadmissible in evidence in view of Section 34 of the Bombay Stamp Act, 1958. The next ground taken is that, the evidence of the witnesses examined by the respondents was not sufficient to mark the document of agreement of reconveyance in evidence. The appellants contend that, the plaintiffs did not examine witness who was conversant with the handwriting of the author of the document and the signature of Ramchandra. The writer of the document, Mr. Kulkarni was dead. The signatures on the document are of Ramchandra and defendant no.1 and one, Ramchandra Aher as a witness. Ramchandra and Ramchandra Aher are dead and defendant no.1 has disputed his signature on the document. In the circumstances, according to the appellants, the document could not have been admitted in evidence without sending the same to the handwriting expert for the purpose of ascertaining the handwriting of the document. The next contention was that, the agreement of reconveyance (Exhibit-70) was not ratified by Bhausahab

after he became major and therefore there was no question of its performance.

7). Perusal of the memo of the appeal against the decree of the trial Court shows that, the contentions as regards the admissibility of the document were not raised therein. These contentions are being raised for the first time before this Court. Mr. Rajput, the learned Advocate appearing for the appellant submits that, the contentions being the contentions of law, there can be no bar in raising the same even at the stage of the Second Appeal. In any case, according to him, these grounds of appeal are substantial questions of law going to the root of the matter and therefore the defendants should be permitted to raise them.

8). There is no doubt that, admissibility of documents in evidence on the ground for want of registration or on the ground of insufficiently stamped are questions of law and that a question of law can be raised at any stage of the proceedings. However, failure to raise the same at the stage of trial and later at the stage of the First Appeal would amount to denying opportunity to the plaintiffs to take the corrective steps as regards the registration and stamping as available to them in law. It is obvious from the memo of the present appeal, that the additional grounds raised are by way of an after-thought. The memo of appeal as filed does not contain any objection to the document of reconveyance. Therefore, the

defendants cannot be permitted to raise these objections for the first time before this Court.

9). This leaves us to consider the other objections taken by the defendants to the impugned decree and the order of the lower appellate Court. The challenge to these two orders are essentially on, improper appreciation of the evidence on record and the document of reconveyance in particular. The document of reconveyance at Exhibit-70 is a handwritten document and signed by three persons. Ramchandra, the father of defendant no.1 has signed the same as the executor. Defendant no.1 and Ramchandra Aher have signed it as the witnesses. It is the case of the plaintiffs that, this agreement was executed immediately after execution of the sale-deed. Defendant no.1 admits his presence at the time of execution of the sale-deed. Though, he denies his signature on the agreement, there is nothing on record to indicate that his signature seen on the document is a forged signature. Plaintiff no.1 in his evidence stated that, the sale-deed was executed on 6th December, 1971 and on the same day the agreement of reconveyance was signed by Ramchandra. The agreement was written by Mr. Kulkarni, a bond-writer in the office of the Registrar at Malegaon. It was executed by Ramchandra with Ramchandra Aher as a witness. Ramchandra had signed it as the guardian of Bhausahab. Defendant no.1, plaintiff no.1 Khandu Tanaji and defendant no.4 had also put their signatures on the agreement. This evidence on the

part of plaintiff no.1 has withstood searching cross-examination on behalf of the defendants. The evidence of plaintiff no.1 is completely supported by plaintiff no.4. He stated, in addition, that when plaintiff no.1 and Khandu went to Ramchandra for loan, he had agreed to lend money only on execution of sale-deed in respect of the suit property by way of security for repayment of the loan. Plaintiff no.1 and Khandu had agreed to execute sale-deed in respect of the suit property in favour of Ramchandra on condition that on repayment of amount, the same had to be recovered. When Ramchandra agreed to this condition, the parties had gone to Malegaon and first visited Stamp Vendor, one Chindade for purchase of two stamp papers. Since Stamp Vendor, Chindade was busy with other work, the agreement was penned down by Mr. Kulkarni, a Clerk in the office. This witness further deposed that, he was present at the time of entire transaction because his father, Khandu was an illiterate person. Plaintiff no.4 being literate was to help him.

10). Thus, the evidence led by the plaintiffs of plaintiff no.1 and plaintiff no.4 is of the persons in whose presence, the document of recoveyance was prepared and executed. Since the document had come into existence in their presence, there was no need for them to be familiar with the handwriting of Mr. Kulkarni or signature of the persons signing the same. Their oral evidence was sufficient to prove the existence of the documents and as such its contents. Therefore, there is no substance in the

contention that, the document of recoveyance could not have been taken into consideration by the Courts below. In any case, the findings on this contention and the other contentions of fact taken by the defendants are concurrent findings of facts. The same cannot be interfered with, by this Court in it's jurisdiction under Section 100 of CPC, unless they are established to be perverse. Perusal of the evidence shows that, the findings are fully supported by it and there is no perversity in the findings. Thus, there is no substantial question of law arising for consideration of the Court. Hence, the Second Appeal is dismissed.

11). At the request of Mr. Rajput, the learned Advocate appearing for the appellants, ad-interim stay of the impugned orders granted by this Court on 10th September, 2014 is extended for a period of 10 weeks from today.

(SMT. R.P. SONDURBALDOTA, J)